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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* DRS. MURPHY, ROSSELL AND WALBERG IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI [1]

Dr. John Murphy received his doctorate of education administration in 1972 from the University of Massachusetts. Dr. Murphy has had an extensive and distinguished career as a school administrator, including serving for five years as the Superintendent of the Charlotte-Mecklenburg school system. In total, Dr. Murphy has served as the superintendent of eight school systems since 1965. He has achieved extraordinary success in narrowing the racial achievement gap and in improving student performance. Dr. Murphy has co-authored a book and written more than a dozen articles on issues relating to educational policy. He has served as a member of the National Assessment Governing Board and is on the Board of Trustees of the National Center on Education and the Economy. In 1997, U.S. District Judge Dean Whipple appointed Dr. Murphy to serve on a three-member panel to oversee the transition of the Kansas City, Missouri, schools to unitary status. More recently, Dr. Murphy has served as an expert witness in numerous lawsuits challenging educational systems and has served as a consultant to states and school districts around the country.

Dr. Christine H. Rossell is Professor of Political Science at Boston University where she holds the Maxwell Chair in United States Citizenship. Holding a Ph.D. from the University of Southern California, Dr. Rossell has been researching and writing about school desegregation for 33 years. She has published four books and approximately 100 articles and reports on the effectiveness of school desegregation plans and the attitudes of parents in relation to desegregation. In addition, Dr.

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1. This brief has been authored in its entirety by undersigned counsel for the *amici curiae*. No person or entity, other than the named *amici* and their counsel, made any monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and their letters of consent are being lodged herewith.

Rossell has designed a number of magnet-voluntary desegregation plans, of which 10 were implemented, and has studied the effectiveness of those plans over time. She has consulted for more than 50 school districts and states in connection with school desegregation and racial equity matters. She has received numerous large-scale federal and private foundation grants to study school desegregation in large samples, beginning with a 113 school district study in 1973 and, most recently, a 600 district longitudinal study awarded in 1991.

Herbert J. Walberg is Distinguished Visiting Fellow at the Hoover Institution, Stanford University. He formerly taught at Harvard University and is Emeritus University Scholar and Professor of Education and Psychology at the University of Illinois at Chicago. Holding a Ph.D. from the University of Chicago, he has written or edited more than 55 books and written about 300 articles on such topics as educational effectiveness. Dr. Walberg served as a founding member of the National Assessment Governing Board, whose mission is to set educational standards for U.S. students and measure progress in achieving them. Dr. Walberg is a fellow of the American Association for the Advancement of Science, American Psychological Association, and the Royal Statistical Society, and is also a founding fellow of the International Academy of Education, headquartered in Brussels. Along with two Nobel laureates, he is a trustee of the Foundation for Teaching Economics. President George W. Bush nominated Dr. Walberg as a founding member of the National Board of Educational Sciences, and that nomination was confirmed by the Senate. The Board plans and oversees an annual $560 million of spending on educational research. Dr. Walberg has frequently testified before U.S. Congressional committees, state legislators, and federal courts on matters relating to educational policy.

STATEMENT OF THE ISSUES

A. Governmental classifications based on race are unconstitutional unless necessary to further a compelling governmental interest. In *Grutter v. Bollinger*, this Court held that the benefits flowing from a diverse student body can be a compelling interest at the graduate school level. Empirical evidence shows that *Grutter*'s rationale is inapposite for primary and secondary schools. Is diversity a compelling interest at the K-12 level?

B. If this Court concludes that the government has a compelling interest in attaining a diverse student body at the K-12 level, that interest should be limited to attaining a group of students with diverse talents, experiences, and viewpoints. Racial diversity, for its own sake, is not a compelling governmental interest. Is Seattle's stated goal of attaining a balance of "whites" and "non whites" at its public high schools a compelling governmental interest?

C. Race-based classifications must be narrowly tailored. Accordingly, when crafting an admissions policy aimed at attaining a diverse student body, the state must treat each student as an individual and cannot make race a decisive factor in the admissions process. Seattle does not consider its students as individuals and has made race a decisive factor in its high-school admissions process. Is Seattle's race-based tiebreaker a narrowly tailored means of achieving diversity?

SUMMARY OF ARGUMENT

This Court has long subjected racial discrimination by the government to the strictest judicial scrutiny. Racial classifications are permissible only if they are necessary to further a compelling governmental interest. Seattle claims that its policy of racially discriminating among students during its school assignment process is the only way that it can obtain the educational benefits that purportedly flow from classroom diversity. But, research by social scientists shows that there are no educational benefits that result simply from racial diversity in a K-12 classroom. Indeed, policies such as the Seattle tiebreaker can actually visit harm upon the students who are uprooted from their communities and subjected to long bus rides. Accordingly, there is no pressing public need to discriminate on the basis of race in order to achieve racially diverse classrooms. Because Seattle's racial tiebreaker does not further a compelling governmental interest, it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Governmental policies that discriminate on the basis of race also must be narrowly tailored to further the interest that purportedly justifies the discrimination. In the context of university admissions, any policy that takes account of race to further classroom diversity must consider each student as an individual and may not use hard numerical quotas. Seattle's racial tiebreaker undisputedly does not treat each student as an individual and uses numerical quotas. Consequently, even if there is a compelling governmental interest in classroom diversity at the K-12 level, Seattle's racial tiebreaker is unconstitutional because it is not narrowly tailored to achieve that interest.

ARGUMENT

A. Diversity Is Not A Compelling Interest At The K-12 Level.

The Fourteenth Amendment to the Constitution of the United States of America provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend XIV, § 1. "Governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227(1995)) (emphasis in original); see also *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (striking down the University of Michigan's undergraduate admissions program). To protect the personal right of each citizen to race-neutral laws, the Court long ago adopted a system of strict scrutiny, requiring any race-based classification, regardless of its underlying motive, to be supported by a compelling governmental interest. *Grutter*, 539 U.S. at 326.

While the exact parameters of a compelling governmental interest are not clearly drawn, several guideposts help chart the terrain. In the first case to employ the standard, this Court held that racial classifications could be justified only by "pressing public necessity." *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Before its decision in *Grutter*, the court had found only two interests compelling enough to clear the threshold: national security during wartime and remedying the effects of *de jure* segregation. *Grutter*, 539 U.S. at 351-52 (Thomas, J., concurring in part

and dissenting in part). This Court rejected every other interest purportedly justifying racial classifications. *Id.* Thus, the theme of the Court's jurisprudence was that racial classifications were tolerable only when necessary to fulfill pressing objectives that could be addressed in no other manner.

Wygant v. Jackson Board of Education illustrates this principle. 476 U.S. 267 (1986). There, the Court struck down a provision of a Collective Bargaining Agreement between the Jackson Board of Education and its teachers' union. The provision called for a form of racial balancing, whereby "minority personnel" could not be laid off in a greater percentage than their current faculty representation. *Id.* at 270. The provision resulted in a period of layoffs where "minority teachers on probationary status" were retained, while "tenured nonminority teachers" were released. *Id.* at 271. Although the provision had been meant to protect minority groups against racial bias, the resulting effect was in derogation of the fundamental rights of individual nonminority teachers. Finding the agreement unconstitutional, the plurality held: "No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive." *Id.* at 276 (emphasis in original).

Indeed, even classifications subject to intermediate scrutiny, a more lenient standard, have been struck down in the absence of an "exceedingly persuasive justification." *U.S. v. Virginia*, 518 U.S. 515, 531 (1996). To survive intermediate scrutiny, a state's policy "must not rely on overbroad generalizations about the different talents,

capacities, or preferences of males and females." *Id.* at 533. By implication, this precedent reveals two important aspects of a compelling governmental interest. First, because intermediate scrutiny is a less exacting standard than strict scrutiny, a compelling governmental interest must be more than "exceedingly persuasive." *Id.* An interest is not compelling merely because it is potentially or theoretically beneficial. Second, a compelling interest cannot rely on generalizations and stereotypes; it must be supported by clear, compelling empirical evidence.

This Court's recent ruling in *Grutter* strayed from the demanding requirements of traditional strict scrutiny in favor of a more opaque, deferential form of review. 539 U.S. at 328. The Court found a compelling interest in "the educational benefits that flow from a diverse student body," allowing the University of Michigan Law School a "degree of deference." *Id.* Among the benefits assumed from diversity at the law school level were the promotion of cross-racial understanding, classroom discussion that is "livelier, more spirited, and simply more enlightening and interesting," and better preparation for "an increasingly diverse workforce and society." *Id.* at 330. While these are laudable goals, two glaring problems are apparent. First, the Court failed to scrutinize the relationship between the Law School's stated goals and a racially diverse environment. While it did cite several amicus briefs and a pinch of empirical evidence, the Court seemed to brush the conflicting evidence under the proverbial rug. Its inquiry was not searching but, rather, deferential. Second, the Court transformed a viable interest into a compelling one. While its analysis revealed the great aims and possible effects of graduate-school diversity, the *Grutter* court did not explain how this created a compelling interest akin to a pressing public necessity.

In this case, the Court has a chance to refortify the meaning of the Fourteenth Amendment, either by overruling *Grutter* or by making clear that it applies only in the context of higher education. For the reasons stated below, the Court should hold that diversity is not a compelling interest at the K-12 level.

1. Social science data do not show a clear link between racial diversity and academic achievement at the elementary and secondary level. Indeed, the evidence suggests that compulsory racial balancing efforts sometimes harm students.

Although the Court of Appeals below declared the "compelling educational" benefits of diversity in secondary education, the bulk of research on the subject tells a different story. *Parents Involved in Community Schools v. Seattle School District, No. 1*, 426 F.3d 1162, 1174 (CA 9 2005). In response to a desegregation order, the St. Louis metropolitan area school district implemented a 15,000 student transfer program that was similar in some respects to Seattle's program. As a part of the program, students were bused hours away from their home neighborhoods. Dr. Robert W. Lissitz's 1994 study of that program concluded that, "[a]fter controlling for [the] initial ability difference, there was virtually no difference in the achievement of students in desegregated schools, suburban schools, racially isolated schools, or magnet schools." ASSESSMENT OF STUDENTS PERFORMANCE AND ATTITUDE, REPORT SUBMITTED TO THE VOLUNTARY INTERDISTRICT COORDINATING COUNCIL (1994). Dr. Lissitz's study confirms what social scientists have reported for years. In study after study, racial composition of a student body, when isolated, proves to be an insignificant determinant of student achievement.

Reporting on a series of studies by the National Institute of Education ("NIE"), Dr. Thomas Cook concluded:

> On the average, desegregation did not cause an increase in achievement in mathematics. . . . I have little confidence that we know much about how desegregation affects reading "on the average" and, across the few studies examined, I find the variability in effect sizes more striking and less well understood than any measure of central tendency.

Thomas Cook, *What Have Black Children Gained Academically From School Integration?: Examination of the Meta-Analytic Evidence* in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 6, 41 (U.S. Department of Education, National Institute of Education 1984). Dr. David Armor recently reached an even stronger conclusion when he reviewed numerous studies designed to determine the effects of racial composition on student achievement:

> Whether one examines data from historical studies, more recent national studies, or district-level case studies, it is quite clear that the racial composition of student bodies, by itself, has no significant effect on black achievement, nor has it reduced the black-white [achievement] gap to a significant degree.

David Armor, *Desegregation and Academic Achievement*, in SCHOOL DESEGREGATION IN THE 21ST CENTURY 183 (Rossell, et al., eds., 2002). Simply put, there is no evidence that diversity in the K-12 classroom positively affects student achievement. See David J. Armor, FORCED JUSTICE (1995); Daniel S.

Sheehan, *Black Achievement in a Desegregated School District*, 107 Journal of Social Psychology 185-192 (1979); David J. Armor, *The Evidence on Busing*, 28 The Public Interest 90, 90-126 (1972); Stanley M. Zdep, *Educating Disadvantaged Urban Children in Suburban Schools: an Evaluation*, 1 Journal of Applied Social Psychology 173 (1971).

Even more disturbing than the lack of evidence demonstrating a benefit from forced racial balancing programs is the evidence showing that they are often *detrimental* to student performance. Drs. Norman Miller and Michael Carlson, members of the NIE review panel, found that more than half (12 of 19) of the studies accepted by the NIE showed negative effects on either reading or math achievement in forcibly desegregated schools. See Norman Miller & Michael Carlson, *School Desegregation as a Social Reform: A Meta-Analysis of Its Effects on Black Academic Achievement* in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 89, 105. Although it is unclear why some racial balancing programs are associated with academic decline, it is readily apparent that simple racial balancing neglects the complexities of human learning, particularly at the K-12 level.

The experience of Dr. John Murphy comports with the data reported by social scientists. Dr. Murphy has been able, time and again, to improve student performance dramatically, without resort to racial balancing. For example, when Dr. Murphy took over the Charlotte-Mecklenburg school system "[t]he average performance of black students. . . . was equally dismal for the students in the few schools that were still predominantly black and for those that were, by any standard, integrated." John A. Murphy, *After Forty Years: The Other*

Half of the Puzzle, 96 Teachers College Record 743, 744 (1995) (hereinafter Murphy, *After Forty Years*). Dr. Murphy improved student performance and substantially narrowed the racial achievement gap not by shuffling students among schools according to their race, but by implementing educational policies tailored to the needs of each school's students. See generally John A. Murphy & Jeffry Schiller, TRANSFORMING AMERICA'S SCHOOLS: AN ADMINISTRATORS' CALL TO ACTION (1992); Murphy, *After Forty Years* at 746-49; see also Herbert J. Walberg, *Desegregation and Education Productivity* in SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 160, 187 ("[R]esearch. . . . show[s] a number of potent factors for improving educational achievement. . . . In this effort, school desegregation does not appear to prove promising. . . .").

To buttress its conclusion that racial diversity produces "compelling educational benefits," the Court of Appeals cited expert testimony to the effect that racially diverse schools resulted in "improved critical thinking skills." *Parents Involved in Community Schools*, 426 F.3d at 1174. Given the evidence detailed above, however, it is clear that the critical thinking skills referenced in the lower court's opinion have not produced higher standardized test scores, the usual methods for assessing those skills. See, *e.g.*, SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 3 (noting "unstandardized [measuring] instruments" among the criteria for rejection of a study). This Court should not recognize a compelling governmental interest on the basis of educational "benefits" that cannot be measured using universally accepted indicators of student learning.

The Court of Appeals also relied on some empirical evidence to support its conclusion that there is a correlation

between "racially concentrated or isolated schools" and "lower student achievement." *Parents Involved in Community Schools*, 426 F.3d at 1177. That evidence suffers from a glaring error, however: the researchers did not control for the socioeconomic status of the students. Indeed, the paper cited by the Court of Appeals notes precisely that "segregated schools have much higher concentrations of poverty. . . ." Erica Frankenberg et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?* 11 (The Civil Rights Project, Harvard Univ. Jan. 2003) available at http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf. But there is little dispute that poverty and student achievement are negatively correlated. See, *e.g.*, James S. Coleman, *et al.*, EQUALITY OF EDUCATIONAL OPPORTUNITY STUDY (United States Department of Education 1966); Christopher Jencks, INEQUALITY: A REASSESSMENT OF THE EFFECT OF FAMILY AND SCHOOLING IN AMERICA (1972). Thus, the evidence cited by the Court of Appeals does not show that "racial isolation" decreases student achievement; it merely reaffirms that economically disadvantaged students do not achieve as well as their wealthier peers. "When individual and school [socioeconomic status] [a]re controlled, however, racial composition d[oes] not contribute significantly to explaining variation in black verbal achievement scores." Armor, *Desegregation and Academic Achievement* at 149; *id.* at 158 ("Again, a regression analysis shows that the percent white in a school does not have a significant effect on black math achievement once individual [socioeconomic status] and school district poverty levels are taken into account.").

A review of the empirical evidence shows that, at best, there is conflicting evidence about the effects of racial diversity in K-12 schools. Given the lack of clear empirical

support for the hypothesis that racial diversity in the K-12 classroom improves student performance, achieving classroom diversity should not be treated as a "pressing public necessity." *Korematsu*, 323 U.S. at 216. Of course, legislatures frequently must act on the basis of thin empirical evidence when formulating governmental policies. But it is one thing for a legislature to base mundane social policies on flimsy social science evidence; it is quite another for this Court to allow it as justification for *de jure* racial discrimination. Because the empirical evidence does not support the hypothesized educational benefits obtaining from classroom diversity, this Court should reject Seattle's asserted compelling governmental interest.

2. Students in forcibly balanced schools have seen no clear improvement in race relations or other student social skills.

The Ninth Circuit also took at face-value that "[s]ocial science research 'clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more . . . inclusive experience for all citizens." *Parents Involved in Community Schools*, 426 F.3d at 1174-75. Again, the Court of Appeals missed the mark. After reviewing numerous studies of the effects of racial balancing on students, Dr. Walter Stephan concluded that the studies showed at best mixed results. Walter G. Stephan, *Improving Intergroup Relations in the Schools*, in SCHOOL DESEGREGATION IN THE 21ST CENTURY 267, 269. White attitudes toward blacks improved in 16% of the schools studied, failed to change in 36% of the schools, and deteriorated in 48%. *Id.* While the results were slightly more optimistic concerning black

attitudes toward whites (38% improvement, 38% no difference, 24% deterioration), these figures do not demonstrate a compelling need for racial discrimination. *Id.* According to Stephan: "The research on short- and long-term effects of desegregation makes it quite clear that desegregation is not a panacea for problems in intergroup relations." *Id.* at 271. And these are not the words of an uncaring pessimist, but a scientist who has dedicated his thirty-five year career to improving race relations.

Other researchers have similarly concluded that racially diverse classrooms have little demonstrable effect on student psychology. In his review concerning the effects of desegregation on students' psychological attributes, Dr. Edgar Epps concluded: "The evidence on the impact of desegregation is inconsistent, but seems to warrant the conclusion that desegregation has no effect on black self-esteem, or lowers it only slightly." Edgar Epps, *The Impact of School Desegregation on Aspirations, Self-Concepts, and Other Aspects of Personality*, 39 Law and Contemporary Problems 300, 307 (1975). After reviewing decades worth of relevant literature, Dr. Janet Schofield, another social scientist who has dedicated her long career to improving race relations, reluctantly concurred. See Janet Schofield, *School Desegregation and Intergroup Relations: A Review of the Literature*, 17 Review of Research in Education 335, 356-61 (1991). Although Schofield stressed the importance of forming healthy intergroup relationships, she also highlighted the problems of compulsory racial balancing programs – from intergroup hostility to voluntary in-school segregation. *Id.* at 339-41, 368-69. This evidence illustrates that corralling our youth into chromatically pleasing formations is not a viable solution to our nation's race problems. "The way to end racial discrimination is to stop discriminating by race." *Parents Involved in Community Schools*, 426 F.3d at 1222 (Bea, J., dissenting).

3. Unlike the private decisions that drive applications to a particular college or graduate school, K-12 assignment has traditionally been compulsory and has been determined geographically.

Aside from the lack of empirical evidence supporting the proffered benefits of diverse classrooms, there is an important difference between K-12 education and "the unique setting of higher education." *Gratz*, 539 U.S. at 271. Applicants for higher education voluntarily choose to apply to any particular school from a vast array of educational institutions across the country. And if an applicant's race deprives him of admission to his top choice for college or graduate school, he will likely have a wide range of alternative schools to chose from. Moreover, many college students are free to move from home, so they are not geographically restricted in their educational options.

The same is not true of K-12 education. Seattle's students have a narrow range of schools from which to choose. When students are denied admission to their neighborhood schools, they often must be bused miles from home. Long commutes typically result in half of the reassigned students, primarily the more affluent, leaving public schools for private schools or moving to the suburbs. *See* Christine H. Rossell, *The Effectiveness of Desegregation Plans* 93 in SCHOOL DESEGREGATION IN THE 21ST CENTURY; David J. Armor, *White Flight and The Future Of School Desegregation* in SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE (Walter G. Stephan and Joseph R. Feagan, eds. 1988); James S. Coleman *et al.*, TRENDS IN SEGREGATION, 1968-1973 (Urban Institute 1975). The families left behind are primarily lower class, thus further concentrating poverty in the central city's schools. *See generally* Christine H. Rossell, THE CARROT OR THE STICK

FOR SCHOOL DESEGREGATION POLICY: MAGNET SCHOOLS VS. FORCED BUSING (1990); Armor, *White Flight and The Future Of School Desegregation*; Dennis J. Lord, *School Busing and White Abandonment of Public Schools* 15 Southeastern Geographer 8192 (1975); Richard A. Pride & J. David Woodard, THE BURDEN OF BUSING: THE POLITICS OF DESEGREGATION IN NASHVILLE, TENNESSEE (1985).

For those students who stay in the public schools, the long bus rides sap the limited time they have to study and enjoy their families. The evidence in this very case shows that, as a result of Seattle's program, some students faced "multi-bus round-trip commute[s] of over four hours." *Parents Involved in Community Schools*, 426 F.3d at 1216 (Bea, J., dissenting). It strains credulity to suggest that the speculative "benefits of racial diversity" to those students outweigh the hardships that accompany spending 720 hours per year commuting to a school on the other side of the city.

Those long bus commutes do more than simply waste time and money. When children are bused far from home, they lose touch with their local communities. They are less likely to participate in after-school activities or to have parents actively involved in school affairs. Working parents cannot drive hours from home to attend PTA meetings or after-school programs. For the same reasons, students can't socialize with their far-flung classmates outside of school. Those students also never firmly grow roots in their own neighborhood because they spend so much time across town. The end result is the opposite of that intended by the creators of the busing program: the bused students are marginalized and isolated both at school and at home. Seattle's school assignment process appears destined to create racially balanced schools at the expense of student learning and community vitality.

Because the range of options that K-12 students have when selecting schools is much more limited than the range of options available to applicants for higher education, and because of the harms associated with compulsory busing, if this Court decides not to overrule *Grutter*, it should limit the *Grutter* interest to "the unique setting of higher education." *Gratz*, 539 U.S. at 271.

B. If This Court Concludes That Classroom Diversity Can Be A Compelling Governmental Interest In K-12 Education, That Interest Should Be Limited To Attaining A Group Of Students With Diverse Talents, Experiences, And Viewpoints.

"[O]utright racial balancing . . . is patently unconstitutional." *Grutter*, 539 U.S. at 330; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496-97 (1989); *Regent of the University of California v. Bakke*, 438 U.S. 265, 307 (Powell, J.). When this Court recognized a compelling governmental interest in achieving a diverse student body in higher education, it simultaneously limited the scope of that interest: "[t]he diversity that furthers a compelling state interest encompasses a . . . broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element." *Grutter*, 539 U.S. at 325 (quoting *Bakke*, 438 U.S. at 315); see *Gratz*, 539 U.S. at 270. That limitation is nothing novel. As Justice Powell stated in *Bakke* nearly thirty years ago, "if [a school's] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid." 438 U.S. at 307. The repeated statements of that principle from this Court could not be clearer: "[r]acial balance is not to be achieved for its own sake." *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992); see

Grutter, 539 U.S. at 330; *Gratz*, 539 U.S. at 270; *Croson*, 488 U.S. at 496-97; *Bakke*, 438 U.S. at 307.

In stark contrast to the repeated, explicit holdings of this Court, the Court of Appeals "read *Grutter* . . . to recognize that racial diversity, not some proxy for it, is valuable in and of itself." *Parents Involved in Community Schools*, 426 F.3d at 1177. Simply put, the Court of Appeals was wrong on the law. Rather than endorsing a governmental interest in racial balancing, this Court explicitly stated that "outright racial balancing . . . is patently unconstitutional." *Grutter*, 539 U.S. at 330. Indeed, on the very same day that *Grutter* issued, this Court reaffirmed that principle when it struck down the University of Michigan's undergraduate admissions policy. *See Gratz*, 539 U.S. at 270 ("[P]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake.") (quoting *Bakke*, 438 U.S. at 307).

If this Court believes that classroom diversity can be a compelling governmental interest in K-12 education, the Court should limit that interest as it did in *Grutter*. In other words, if there is a compelling interest in classroom diversity at the K-12 level, that diversity must "encompass[] a . . . broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single . . . element." *Grutter*, 539 U.S. at 324. And the state cannot use race as a proxy for diverse talents, experiences, and viewpoints by stereotyping different racial groups and treating each group as if each member were the same as every other member. *See Croson*, 488 U.S. at 500 ("[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals."). Rather, the state must treat each student as a

unique individual and seek to achieve a diversity of talents, experiences, and viewpoints in its schools. *Gratz*, 539 U.S. at 271-72.

The Court of Appeals clearly erred when it recognized pure racial balancing as a compelling governmental interest. As will be discussed below, that error infected the Court of Appeals's analysis of whether Seattle's assignment process is narrowly tailored. This Court has repeatedly held that naked racial diversity cannot be a compelling interest. Accordingly, any compelling interest in achieving diversity at the K-12 level must be limited to attaining a mix of students with diverse talents, experiences, and viewpoints.

C. Seattle's Race-Based Tiebreaker Is Not Narrowly Tailored To Achieve Diversity.

As was discussed above, the Court of Appeals erroneously treated Seattle's asserted interest in achieving a balance of "whites" and "non-whites" as a compelling governmental interest. As a direct result of that treatment, it concluded that Seattle's racial tiebreaker was a narrowly tailored means of achieving diversity. If this Court concludes that there is a compelling governmental interest in classroom diversity and limits that interest as it did in *Grutter*, it should also hold that Seattle's race-based tiebreaker is not narrowly tailored to further that interest. Seattle does not treat its students as unique individuals, but instead uses race as a decisive factor in its school assignment process. Accordingly, even if this Court were to extend *Grutter* to the K-12 setting, Seattle's school assignment process cannot stand.

1. Seattle's program does not give individualized consideration to each student and relies on hard numerical quotas.

To withstand strict scrutiny analysis, the governmental proponent of a racial classification must show that its policy is "narrowly tailored." *Adarand*, 515 U.S. at 227. "Because racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification, [the Court's] review of whether such requirements have been met must entail a most searching examination." *Gratz*, 539 U.S. at 270 (internal alterations, citations, and quotation marks omitted). Thus, an admissions program designed to further the compelling interest identified in *Grutter* must "consider[] each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education." *Id.* at 271. And, such a program cannot "mak[e] the factor of race decisive" for nearly every applicant from an underrepresented group. *Id.* at 272 (internal quotation marks omitted). Rather, "each characteristic of a particular applicant [must] be considered in assessing the applicant's entire application." *Id.* at 271.

Another clear rule obtains from the Fourteenth Amendment's narrow tailoring requirement: numerical racial quotas are unconstitutional. *See id.* at 275; *Croson*, 488 U.S. at 507; *Bakke*, 438 U.S. at 307. Although this Court has approved the goal of obtaining a "critical mass" of diverse students at the graduate school level, it made certain to distinguish that approach from a hard numerical quota. *Grutter*, 539 U.S. at 335-36 ("The Law School's goal of attaining a critical mass of underrepresented minority

students does not transform its program into a quota."). In this context, "critical mass means meaningful numbers or meaningful representation." *Id.* at 318. Importantly, "there is no number, percentage, or range of numbers or percentages that constitute critical mass." *Id.* Indeed, one of the primary points of contention between the majority and dissent in *Grutter* was whether or not the affirmative action plan's "critical mass" was a *de facto* quota. Compare *id.* at 329-30 with *id.* at 385-86 (Rehnquist, J., dissenting) and *id.* at 389-90 (Kennedy, J., dissenting). The majority concluded that it was not, but importantly, the Court felt a need to reach that conclusion in order to uphold the program. *Id* at 329-30, 335-36. Accordingly, numerical racial quotas remain patently unconstitutional. *See, e.g.*, *Croson* at 507 ("[T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.").

In direct contravention of this Court's express holdings, the Court of Appeals held that "a district need not consider each student in a[n] individualized, holistic manner." *Parents Involved in Community Schools*, 426 F.3d at 1183. That holding was clearly wrong. See *Gratz*, 539 U.S. at 270; *Bakke*, 438 U.S. at 307. Of course, given the nature of the "compelling interest" identified by the Court of Appeals, its error in this regard is unsurprising. But because "outright racial balancing . . . is patently unconstitutional," *Grutter*, 539 U.S. at 330, an admissions program must evaluate each student as an individual.

The facts are clear: Seattle does not consider its students as individuals. Rather, it classifies students as "whites" or "non-whites" and uses that single classification as the decisive factor in determining the placement of a large number of students. The district admittedly does not seek to

achieve a diversity of talents, experiences, and viewpoints in its classroom, but instead seeks a specified proportion of whites and nonwhites. Accordingly, Seattle's plan is not narrowly tailored and violates the Equal Protection Clause. *Gratz*, 539 U.S. at 274.

It is also undisputed that Seattle's racial tiebreaker uses a hard numerical quota. If the level of non-white student enrollment in an oversubscribed school is less than 45%, the racial tiebreaker is used to admit only non-white students until the prescribed quota is filled or the non-white applicant pool is exhausted. Similarly, if an oversubscribed school has less than 25% white enrollment, the racial tiebreaker is used to admit only white students until the quota is filled or the white applicant pool is exhausted. Seattle is not seeking to achieve a "critical mass" with this approach, but is instead determined to fill rigid numerical quotas of white and non-white students in each of its schools. For this reason also, Seattle's school assignment process is not narrowly tailored.

Although all racial classifications are pernicious, the classifications used by Seattle are particularly offensive. Far from treating each student as an individual, Seattle does not even treat each racial and ethnic group individually. Instead, Seattle treats all students as "white" or "nonwhite." Thus, the son of an Irish family whose ancestors arrived in this country centuries ago is assumed to contribute to diversity in the same way as the daughter of first-generation Russian immigrants. And, what's worse, Asian immigrants, African immigrants, Latin-American immigrants, Native Americans, and Eskimos are all assumed to contribute equally to a school's diversity. So if a particular Seattle school had "too many" Native American students, the daughter of an Asian immigrant would be rejected in favor of a white student, even

if the school did not have a single Asian-American student. The undifferentiated manner in which Seattle classifies its non-white students belies any claim that it is seeking to attain a diversity of individuals with unique talents, perspectives, and viewpoints. *Cf. Croson*, 488 U.S. at 506 ("The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.").

An even more offensive aspect of Seattle's policy is the way in which students who refuse to self identify their race are assigned. Rather than simply ignoring the racial tiebreaker for that student, school officials perform a *visual inspection* of the child and assign the child to a racial group based on the inspection. *Parents Involved in Community Schools*, 426 F.3d at 1204 n.15 (Bea, J., dissenting). This practice shows Seattle's true interest: achieving a specified range of skin tones in the student bodies of each of its schools. It is clear that Seattle's admissions program is narrowly tailored to achieve only one goal: obtaining specified percentages of "whites" and "non-whites" in its schools. See *Croson*, 488 U.S. at 507. When a school's "purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid." *Bakke*, 438 U.S. at 307. Because Seattle's racial tiebreaker is nothing more than "discrimination for its own sake," *id.*, this Court should reverse the Court of Appeals.

2. Seattle has not seriously considered race-neutral alternatives.

"The term 'narrowly tailored' . . . has acquired a secondary meaning. [It] require[s] consideration of whether lawful alternative and less restrictive means could have been used." *Wygant*, 476 U.S. at 279 n.6. In other words, if there is an alternative method of furthering an asserted compelling governmental interest that does not require racial discrimination, the government must use that race-neutral method instead. See *Grutter*, at 340 ("Narrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.").

If Seattle wanted to attain diverse classrooms without using race, it could have done so. Around the country, school districts have achieved diverse classrooms without resort to racial discrimination. Those districts have used a variety of approaches, such as giving preferences to economically disadvantaged children and using pure lottery systems. For example, Wake County, North Carolina, has taken steps to equalize the percentage of students in each school who are eligible for free or reduced lunch under Title I. See Wake County Public School System Student Assignment Process, available at http://www.wcpss.net/growth-management/student-assign-process.html (last accessed August 11, 2006). A similar program is used in San Francisco, California. *See* San Francisco Unified School District Student Assignment Process, available at http://portal.sfusd.edu/template/default.cfm?page=policy.placement.process (last accessed August 11, 2006). If Seattle desired to achieve a diversity of perspectives and experiences among the students in its classrooms, it could have followed the examples of

other districts around the country and sought to balance the percentages of economically disadvantaged students attending each of its schools. Instead, Seattle opted to engage in outright racial balancing. Because Seattle did not seriously considered race-neutral means of achieving its asserted goals, the racial tiebreaker is unconstitutional.

CONCLUSION

Because classroom diversity is not a compelling governmental interest at the K-12 level, and because Seattle's school assignment process is not narrowly tailored to achieve classroom diversity, this Court should reverse the Court of Appeals and hold that Seattle's school assignment process is unconstitutional.

Respectfully submitted,

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